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TRUST REGULATION

EXPEDIENCY OF COMMODITY COURT

BY ALBERT FINK

II

PUTTING out of view any question of the constitutional power of Congress to organize a Commodity Court or Commission with authority to prescribe a maximum or reasonable charge beyond which trust or quasi-trust products may not be sold, and assuming *arguendo* that such power in fact exists under the Commerce Clause, the next question which suggests itself is as to the expediency of its exercise.

At the outset it must be admitted that the suggestion is at least novel and would seem an effort to control by legislation matters which, if possible, should be left to the natural laws of supply and demand. So far as can be observed, though as yet no very clear statement of their case has appeared in the public prints, the advocates of a commodity court, modeled in the main after the fashion of the Interstate Commerce Commission and invested with price-regulating powers, seem to be composed of two distinct schools of political thought. First, those who believe they see in the necessities of modern civilization an imperative demand for large combination, who insist that restriction of competition is economically sound, resulting in elimination of useless waste, and who, while believing that there should be no governmental interference at all, nevertheless advocate the proposed tribunal as a compromise measure—"a sop to Cerberus," if you please—in the nature of a guarantee to the public against the dreaded extortion of an unrestrained industrial monopoly. Secondly, those who are opposed to all forms of large combination, insisting that competition remain unrestricted, no matter how cruelly ruinous or wasteful of human energy it may prove, but who

nevertheless favor the proposed legislation from an abiding despair of preventing such combination or otherwise adequately dealing with a situation they have come to regard as intolerable.

Both classes seem to advocate the measure from a sense of helplessness and inability to suggest other or better remedies rather than from any apparently deep-rooted conviction of its wisdom. As one of the curses of the times is believed to be "legislative tinkering" and an aptitude for political nostrums when it is suggested that there be a departure so radical from the well-tried principles of government as understood for many generations, as embodied in the utterances of the best experts upon the subject and as evolved by the gradual development of the science, it would seem the part of wisdom before embarking upon these strange and unexplored seas or entering upon these new and untried bridle-paths to examine somewhat minutely both the evil complained of and the remedy suggested.

The evil complained of for which the proposed remedy is offered as a specific is that the monopolistic trusts, having exterminated all competition, will, unless prevented by government, exploit the public by demanding for their products an unreasonable and extortionate price. The remedy suggested is to create by law a maximum beyond which they may not charge. Obviously if there exist combinations of capital which have in fact eliminated all competition and are able to continue so to do, and if there be no other natural law which will in its operative effect protect the public from exploitation, all will agree that government regulation even as to price is not only expedient, but imperative. If, however, on the other hand, it can be shown that there are not now, nor ever can be created in a government such as this, monopolistic trusts with power to eliminate competition otherwise than by the sale of a superior article at a minimum price, and if it can be shown that such policy, even if possible, would be in direct contravention of the material pecuniary benefit of the monopoly, then in either event all should agree that the proposed legislation is useless, undesirable, and unnecessary for the purposes for which it is suggested.

Monopolies are of two kinds. First, those which exist by government grant whereby an exclusive privilege is given to the few, to the exclusion of others, who are prohibited

by law from engaging in the same or similar enterprises; and, secondly, those which are based purely on economic conditions and created by the ability to produce and market a given commodity at a price cheaper than the same article can be manufactured and distributed by others. As to the first we have little concern. They never have and probably never will exist in this country, save in such a limited sense as may arise from the operation of the patent and copyright laws to which there is no apparent objection. As to the second the danger so far, at least, as excessive prices or inferior product is concerned, would seem to be remote.

In the first place, there has never existed in this country a combination so powerful as to throw off *all* competition, nor even in the absence of the Sherman Act is such combination possible where all are free to enter upon any field of enterprise or industry at such time and upon such terms and conditions as they see fit. Not even Standard Oil, with its superbly organized system, its espionage over competitors, and its baneful domination of the carriers, was able to control the entire manufacture and distribution of refined oil. The Sugar Trust has, perhaps, more nearly than any other approached an actual monopoly; but even here, with all its false weights, rebates, and corrupt manipulation, it was unable to control more than ninety per cent. of the business of refining and distributing sugar, and it is immaterial, so far as the price of the product is concerned, that the trust controls the vast bulk of the business, for any enhanced, excessive, or unreasonable price is merely a signal to the independents already engaged in the business to increase the capacity of their plants and widen the scope of their operations, while to those not already so engaged it is an invitation to enter the field. Monopoly-controlled banks may refuse loans. The "money trust," if such there be, may protest. The monopoly itself may threaten and bully, but the ultimate fact remains that whenever a profit can be shown, either by reason of some new and secret process, the acquisition of some patent, or the enhanced price of the monopoly-controlled products, capital for competition will be available both here and abroad. No sooner will the new rival have entered the field than monopoly must either buy him out at a profit, which is merely to invite others to repeat the same performance, or else so reduce the price of the commodity as to force its new rival to operate at a

loss; but this means that monopoly must undersell its rival's cost of production in all the markets of the country, and inasmuch as this rival is able to secure long-time contracts for its output the process of elimination proves tedious and more costly in the end than would have been the case had monopoly in the first instance maintained a price sufficiently low to render unattractive any invasion of its field of activity.

It is true that an actual monopoly might be created and competition completely eliminated by acquisition or control of transportation of the raw material, but as to the former the railroads have been very thoroughly divorced from the industrials, and an Interstate Commerce Commission and very drastic laws have rendered discriminatory rates and rebates relics of the past. As to the latter, it is hardly likely that any combination will ever be able to acquire that control of the raw material necessary to the successful operation of monopoly bent on public exploitation through excessive prices. The country is too vast, its resources too boundless; such a plan would mean too much idle capital locked up in natural resources for the sole purpose of preventing their acquisition or use by others. Monopolies must pay the interest on their bonded indebtedness and dividends to their stockholders. So, too, the cost of importation of the raw material from other lands is in many instances less than the cost of its transportation from one part of this country to another. And to acquire that monopoly which would or could appreciably affect the price of the finished product, not only must the raw material of this country be controlled, but that of the world as well. Again, it is to be remembered that no sooner does a trust commodity reach a price unreasonably high than it comes in direct competition with the world at large. It must always be sold in this country at the price at which it is offered in other nations plus freight and tariff. Ocean freights add little to the cost of production, and, inasmuch as one of the great political parties is avowedly for free trade and the other for a tariff only, where such is needed to protect the home industry, any excessive price may be promptly regulated by the simple process of tariff reduction.

But there is yet another natural law of trade which precludes the possibility of excessive or extortionate charge. Just as in the manufacture of automobiles the constant

effort is to produce a durable and efficient machine at a reduced price, so in every other industry the same tendency may be observed, nor is the ultimate purpose solely to undersell the competitor. It is a fundamental principle underlying the modern conception of sound business methods. A market must be made for the product. This market must be developed, cultivated, and enlarged. Such prices must be offered to consumers as will not only *enable* them, but also *induce* them to buy. Such combinations as aspire to monopoly in any given field require large investments of capital. This outlay must be distributed in mills and plants located at such convenient places throughout the country as have been calculated to be the cheapest and most economical points for manufacture and distribution. Great pay-rolls fall due weekly and monthly. There are terminal and managerial expenses, stupendous fixed charges, interest, dividends. These mills must be kept going else there is so much wasted and idle capital. These employees must be kept engaged lest labor skilled in the specific trade fall into the hands of willing and ever-ready competitors. The fixed charges must be met, the interest paid when due. Dividends must be earned. This requires a market here or abroad. A surplus may occasionally be sold abroad cheaper than at home, but this must be a rare occurrence if a protective tariff is desired. The market at home must be made to absorb the bulk of the product. Obviously the commodity must be offered at a price at which the home market is able to buy, or the market itself is destroyed. The day of small sales and large profits has long since departed. All business science points to large and ready sales with low profits—rapid turning over of the capital invested. A large market with small profits has these advantages over a small market with large profits: in the first case the market itself gradually expands, thus in turn increasing the profits, while in the other case the market gradually shrinks as people cease consumption and educate themselves to the use of substitutes, thus in turn forcing an ever-increasing price in order to maintain an equilibrium of profit. Obviously a diminishing market with a corresponding increase in price invites competition, while an expanding market with a decrease in price has an opposite effect.

In view of these considerations, it would seem that the danger of excessive or unreasonable charges upon trust-

controlled or partially controlled products is more fanciful than real, that from economic laws more potential in their operation than those of any legislature, there is little reason to fear that in the near future at least there will be either such monopolization of production or distribution of any given commodity or elimination of a balancing and equalizing competition as need cause serious alarm. In order to insure reasonable prices, it is not necessary that there be actual competition. It is sufficient that there *may be—self-interest does the rest*. When the price of cotton reaches an unreasonable figure over the cost of production there is a corresponding increase in the next year's crop. When the price becomes unreasonably low, production is curtailed. As it is with cotton so it is with every other commodity. The natural laws of trade, of supply and demand, more surely maintain a just and desirable equilibrium than would be possible by virtue of any legislative act.

But even if it be conceded that the price of monopolistic products might at times be slightly in excess of what they would be if there were no large combinations, and the manufacture and distribution were more equally divided among numbers of competitive individuals and corporations such as existed prior to the time when improved transportation facilities made available to the producer the markets of the entire country, thus rendering such combinations possible, it does not yet follow that such a condition is wholly undesirable. For the greater the profit to the manufacturer the greater the possible wage to labor. And if there be an excess in price, a profit over and above that which would exist under a system of greater competition, this in itself enables labor to exact and secure a larger wage. The whole underlying theory of our tariff system is to prevent as far as possible our people coming into direct and unrestricted competition with the pauper populations of foreign countries. The principle in the one case is directly applicable to the other. For if it be true that a protective tariff which enables a manufacturer to obtain a better price for his product in the home market than he could otherwise secure also enables him to pay a higher rate of wage, it necessarily follows that if monopoly is able to secure a higher price it also can afford a greater wage. Nor is it any answer to say that as no higher wage is paid under the tariff system so no greater would be received, even though a larger price

was secured by monopoly. For as to tariff the statement is not true in point of fact; and even were the contrary the case it is immaterial to this discussion, for if it be admitted that labor does not receive its just share of profit this fact does not depend upon similar considerations; it involves different principles and requires other and further remedies. Though believed to be wholly unwarranted in point of fact, it may for the purpose of argument be admitted that no manufacturer, monopolistic or otherwise, will willingly give up any greater proportion of his profit than he is compelled to. Surely, however, this does not obviate the necessity of creating the profit before arranging for its division. All will agree that before there can be any just or other divisions the profit itself must first be created and obviously the larger the profit the more to divide.

It is upon labor more than upon any other class of our citizens that unrestricted competition lays its heavy hand. The great industrial problem which this generation must solve, and solve correctly, is believed to be the formulation of some plan whereby reserving individual freedom, initiative, and independence, labor will yet be relieved from the present necessity of coming into such cruel and unrestricted competition with itself; but of this more will be said in a subsequent article. The only point here sought to be made is that such slight occasional and temporary increase in the price of monopoly-controlled commodities, if such would in fact be the result, is not necessarily of itself to be deplored and need cause no great alarm.

Though not strictly pertinent to this discussion, as pointed out in a previous article, the fixing of maximum prices beyond which trust commodities may not be sold in no way tends to preserve that competition so ardently desired by one school of political thought. It is of no assistance to the independent in any field of industry. Competition is eliminated by underselling, not by overselling the market. To secure the business, trust prices must be met. To lower these by governmental action makes still sharper competition. It is only by establishing minimum rates, thus preventing the independent from being undersold, that he can be at all aided. Surely no one would advocate the fixing of a minimum rate below which a commodity might not be sold to the end that some one or more engaged in a similar industry might derive profit thereby. Not only then does

there seem to be no apparent necessity for the proposed legislation, but even its working practicability may well be doubted.

Let us suppose that a Commodity Court has in fact been organized, composed, say, of five members and with jurisdiction to fix maximum charges, beyond which no person or corporation engaged in interstate commerce, and who has acquired a monopoly or partial monopoly, may sell his or its products. Let us assume that this court has been given power to issue subpoenas, compel the attendance of witnesses, punish for contempt, and enforce its decrees in the same manner and under like circumstances with other courts. How is its machinery to be set in motion? Is it to be by complaint of any individual who thinks the price of nails manufactured at Cincinnati should be the same at New Orleans as at St. Louis? Or is its jurisdiction only to be invoked by government? If the latter, at whose instigation must government act and under what circumstances? If the former, the court will not be without business.

To what extent must any given article be trust-tainted before it falls within the jurisdiction of the court? Must the alleged monopoly be complete or only partial? If the former, will the jurisdiction end when some independent, no matter how insignificant, shall have entered the field? If the latter, to what extent? Will it be necessary to show that the corporation complained of does thirty or sixty or ninety per cent. of the entire business of the country in the given commodity under investigation?

Mr. Bryan once suggested that no corporation be permitted to handle more than fifty per cent. of the total business of the country in any given industrial field. Suppose, for the sake of any better, this figure be taken as an experimental working basis for the first "legislative tinkering" upon the subject, though, as has been pointed out, it is obvious that the manufacture and control of fifty per cent. will not and cannot either fix or maintain the selling price. The United States Steel Corporation manufacturing sixty per cent. of the steel rails of the country, and thus clearly within the jurisdiction of the court upon this specific commodity, is cited, let us say, to appear and show cause, if any it has, why the price of rails should not be reduced from thirty to twenty-five dollars per ton. Thirty dollars is and has been the market price. After a full hearing, the

court is of the opinion that this price is unreasonable and excessive and orders the reduction prayed for in the bill of complaint. Will the independents now be permitted to realize thirty, while the United States Steel is compelled to sell at twenty-five? Of course it is no answer to say that the market will immediately drop to twenty-five, for there may not be sufficient steel rails on hand or capable of manufacture by the Steel Corporation to supply the demand. If compelled to sell at twenty-five—to whom, it may be asked? To those who first made demand or will every one desiring the product be entitled to share ratably in this court-granted windfall? If the former, in what particular form must the demand be made so as to render it binding and obligatory upon the vendor? If the latter, will the division be according to necessity or speculative desire? How long will the order of reduction remain in force? If by reason of sudden rise in the price of raw material or labor, or such unusual demand as necessitates overtime operations with their attendant increase in the cost of production, must there be a reinvestigation, or may the corporation itself be the judge as to whether or not the order should be modified? When once sold by the trust, will the article be relieved in the hands of the purchaser of its original taint to the end that it may be resold by the first vendee at what price he wills, or shall it still remain impressed with its original character of trust-produced commodity? Obviously, if the former policy is presumed, it enables the trust to sell to its favored few, who may then resell at what price they will; while if the latter is adopted the whole doctrine of the absolute right of private ownership of personal property becomes abandoned. Must the commodity be sold for the same price in all the markets of the country, or will a base price be fixed at the place of production and the manufacturer be permitted to add to this the cost of transportation to the point of ultimate sale? What becomes of long-time contracts? Will the vendees be given the benefit of any reduction made by the court in the selling price? What of warranties? May a trust-tainted commodity be sold at a greater price if its efficiency and durability are guaranteed? If so, for what per cent. of excess?

Again, what will be the standard measure or principle upon which it will be adjudged that a given price is reasonable and proper or unreasonably excessive and extortionate?

Will the measure be a given rate of interest upon the capital invested? If so, how much? Will it be ten or twenty or thirty per cent. or the average interest value of money loaned on good security? Will any allowance be made for or premium placed upon efficient and economical management, system, or order, or will such economy in production mean simply a decreased selling price? If the former, how much, translated into figures? If the latter, to what extent will inefficient management, extravagance, and want of order and system be allowed as an excuse for a higher selling price than would otherwise be permitted? Will the permissible basis of profit be upon the physical valuation of the property employed in production or upon the price paid by the public for the securities? If the former, the great industrials must collapse, for in their several plans of consolidation so great have been the prices paid for bonuses, commissions, and good will that unless the per cent. of profit be fixed at a very high figure these combinations would find themselves unable to pay the interest on their bonds, much less earn dividends for their stock. Such a policy would mean simply an outright confiscation of the funds of hundreds of thousands of innocent stockholders who have invested their savings in these securities in the utmost good faith. If, on the other hand, the price paid by the public is to form the basis of the authorized profit, there would seem to be no necessity for the proposed legislation. For it is to be remembered that the monopolistic trusts are not privately owned concerns. They are not close corporations whose stocks, parceled out among the few, lie in safety boxes secure from onslaught. The great industrials, like the railroads, are owned by the public. Their interest-bearing bonds, their preferred and common stocks, are offered for sale in all the great markets of the world. He who thinks their profits excessive may participate therein, thus reimbursing himself for any overcharge which may have been imposed by reason of his consumption of manufactured articles; the laborer, the clerk, the farmer who has saved one hundred dollars, the public at large, all may share.

Will the power of the court extend to labor when it has become unionized in the same proportion to the total as shall be determined to be sufficient to give the court jurisdiction over the commodity? Will the court decree a price beyond which labor shall not charge for its services? If so, what

will be the principle upon which this decision will be made to rest? What is a reasonable wage for labor? These are all pertinent and important practical questions which must be answered by the legislature, for it is hardly to be expected that Congress will ever vest in any tribunal the jurisdiction proposed without rule or guide, standard measure or principle, other than the whim and caprice of the court. Unless, of course, the reign of law is to be utterly abandoned for that of men.

It has been suggested as one of the principal reasons for the proposed legislation that some tribunal be created from which business might secure advance and authoritative information as to what it could or could not do. It is hard to conceive of a doctrine more un-American in its principle. It is little removed from absolutism. A body with power to say to one set of men "you may," to another "you may not." To one corporation "you may engage in this enterprise to this limited extent," to another "you shall not." Desperate indeed must be a situation which evokes such suggestion. Better had we in the first instance elect some able, industrious, and benign prince whose will shall be ultimate law. It is to be hoped that neither the American people nor business, big or small, will so far surrender their prerogatives as to place themselves in the position of asking any court or commission what they may or may not do. What the law permits they may do, from what it prohibits they must abstain.

But it will be said that the same objections now set forth were urged against the Interstate Commerce and the several State Railway and Public Utility Commissions and that experience has demonstrated them unsound. The suggestion would be conclusive if there was no distinction between the operation of the proposed Commodity Court and these Commissions. Such, however, is not the case. The difference is fundamental. In the case of Commissions fixing rates for public utilities all are treated alike. No sooner does a new carrier spring into existence than automatically it comes under the jurisdiction of the Commission. The rules that are applied to all others are extended to it. There is no discrimination; telephone and telegraph companies, water and lighting plants, all transportation companies operating in the same area are in law upon an equal footing. In the case of the proposed Commodity Court, all en-

gaged in the same field of industry are not to be within its jurisdiction. There will be independents not subject to its rules or regulations. It is as if the Great Northern Railway were within the control of the Interstate Commerce Commission and the Northern Pacific without. In fixing the maximum charges for the grain elevators of Chicago the legislature of Illinois made no discrimination; all were equally within the law. So these public utilities, clothed with quasi-governmental powers within their spheres of operation, are monopolies in fact. The world's competition, the natural laws of trade, do not operate upon them as directly or potentially (often not at all) as in the manufacture and distribution of the ordinary articles of commerce. Nor does it at all follow that because it has proven expedient for government to control and regulate public utilities the same result would be accomplished by a similar control over the prices of commodities.

It has been suggested that an appeal be allowed from the proposed court. If so, to what tribunal? Will it be to the District Courts of the United States or to some Circuit Court of Appeals. Will the Supreme Court, in addition to its already overwhelming burdens, be compelled to at times abandon the realm of law and enter upon a minute investigation of all the various prices of production? If there is to be any ultimate review by the courts the jurisdiction had as well be there placed in the first instance, giving to the vendee of the commodity in question the right of private action for any unreasonable excess in purchase price, thus rendering the courts not only law tribunals, but also *administrators for the more equitable distribution of personal property*.

In view of the foregoing considerations, it would seem that the suggestion of a Commodity Court or Commission with the jurisdiction and powers proposed is not only unnecessary, but utterly impracticable, except with such fundamental changes and modification of commercial intercourse as would meet the approval of no one. *Surely there must be some other solution.*

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